Supreme Court, U.S.
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No. 97-1600

In The

Supreme Court of the United States

October Term, 1997

MONIKA BAYER,

Petitioner,

v.

STANFORD UNIVERSITY SCHOOL OF MEDICINE/ MEDICAL CENTER; STANFORD UNIVERSITY; I. ROSS McDOUGALL, and GARY M. GLAZER,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California, Sixth Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant a Petition for Certiorari that:

1. Is untimely;
2. Seeks review of a state court proceeding in which no federal question was presented or decided;
3. Presents no conflict with any decision of another federal circuit court or state court of last resort; and
4. Raises factual arguments and issues of state law, but no substantial federal question?

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INTRODUCTION

There is no reason to review this routine employment dispute resolved on the facts by binding arbitration. The Petition for Certiorari is untimely and presents no substantial federal question. Indeed, no federal question was raised in the state court proceedings Petitioner asks the Court to review.

After losing in binding arbitration and four times in the courts of California, Petitioner stubbornly refuses to concede defeat. Her untimely Petition for Certiorari essentially seeks to relitigate her factual contentions in this Court. Not only are her factual issues inappropriate for review but, were this Court to entertain them, it surely would conclude what the Arbitrator, California Superior Court, Court of Appeal and Supreme Court concluded: Petitioner's claims are without merit and she has had more than a full and fair opportunity to present them. Any further review of this matter would be a waste of resources. This Court should deny certiorari.

STATEMENT OF THE CASE

Petitioner Monika Bayer is a former employee of Stanford University Medical School. Bayer worked at Stanford as a Senior Research Scientist. Her position was contingent on the needs of the Principal Investigator for whom she worked. App. 1:17-19.[1] Bayer knew that her

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[1] "Pet." refers to the Petition for Writ of Certiorari, "Pet. App." to the Appendices to the Petition, "App." to the arbitrator's opinion, "Dec." to the court of appeal's decision, "AA" to Petitioner's appendix filed in the court of appeal and "RA" to Respondents' appendix filed in the court of appeal.

position depended on programmatic need, and when the Principal Investigator retired, demand for her work declined. Bayer acknowledged that after 1989, there was no need for a Senior Research Scientist. App. 1:24-25; RA 170-179.

Stanford offered Bayer a new job as Operations Manager in the laboratory, but she viewed it as a demotion and refused to accept it. AA 51:2-3. Instead, she requested, and was granted, a layoff "in accordance with University procedures because of lack of need for a Senior Research Scientist . . . " App. 2:27-3:1. As the arbitrator found:

> [T]he exhibits show that Dr. Bayer requested that Stanford lay her off because she acknowledged that the lab no longer needed her to serve in the capacity for which she was hired. Stanford complied with Dr. Bayer's request and laid her off, giving her three months' pay in lieu of notice and severance pay. Dr. Bayer never objected to the lay off or to the receipt of compensation. In fact, she thanked the grievance committee for complying with her wishes in laying her off. Def. Exh. 154. Such facts do not indicate that Dr. Bayer resigned.

App. 3:20-4:2.

Nevertheless, Bayer sued Stanford in Santa Clara County Superior Court, alleging termination of employment in violation of public policy, gender discrimination, age discrimination, retaliation and harassment, breach of implied contract and breach of the implied covenant of good faith and fair dealing. AA 1-27. The parties agreed to submit the dispute to final, binding arbitration, AA

36-43, and the Honorable Barbara Caulfield (Ret.) was appointed as arbitrator. RA 113.

The six-day arbitration included eight witnesses and 247 exhibits. The discrimination, retaliation and harassment claims were dismissed with prejudice during the proceeding. App. 3:9-10. The remaining claims for constructive and wrongful discharge, breach of implied contract, and breach of the implied covenant of good faith and fair dealing were arbitrated to a decision. Neither party requested a transcript, and both agreed that post-hearing briefs were unnecessary. RA 114-15; 117:14-23. Judge Caulfield, as arbitrator, ruled that:

> Dr. Bayer has failed to prove her claims. . . . The primary block to all of her claims was the overwhelming evidence that she was laid off rather than fired. Therefore, Stanford University School of Medicine/Medical Center and Stanford University are not legally liable to Dr. Bayer for any of the claims asserted.

App. 6:15-20.

The superior court confirmed the award. Pet. App. 15a-17a. The court of appeal affirmed, Pet. App. 1a-7a, and denied Bayer's Petition for Rehearing. Bayer then filed a Petition for Review with the Supreme Court of California on July 25, 1997, which was denied on September 17, 1997. Pet. App. 19a. This concluded the state appellate process. Cal. R. Ct. 24(a) (an order of the Supreme Court denying a petition for review becomes final when it is filed). At no time in that process did Petitioner attempt to raise any federal question.

On November 17, 1997, Petitioner initiated a new, collateral proceeding for extraordinary relief by filing a document entitled "Petition for Writ of Review," in the Supreme Court of California. Pet. App. 22a. This document argued for the first time that the California courts' failure to sustain her claims denied due process. The California Supreme Court denied this petition on December 23, 1997. Pet. App. 21a.

The Petition for a Writ of Certiorari was filed on March 18, 1998. It seeks review of the judgment of the court of appeal, not the California Supreme Court's denial of Bayer's request for an extraordinary writ in her last Petition for Writ of Review. Pet. 10.

SUMMARY OF ARGUMENT

First, the Petition is untimely. It was filed more than 90 days after the California Supreme Court (the highest court in which a decision could be had) denied review of the judgment complained of here. The time was not extended or restarted by Petitioner's subsequent collateral request for an extraordinary writ.

Second, the federal due process claim alleged in the Petition was never raised in the appellate proceedings below. Although due process was mentioned in Petitioner's collateral request for extraordinary relief, the Petition does not seek review of that matter.

Third, on the merits, the Petition fails to raise any substantial federal question worthy of review. The thrust of the Petition is that Petitioner was denied due process simply because she lost before the arbitrator and the

courts below. The Petition also reargues contentions of fact and state law that were fully litigated and decided adversely to Petitioner, not once but several times. There is no conflict in decisions or any important question requiring this Court's attention. The Petition should be denied.

ARGUMENT

I. THE PETITION IS UNTIMELY

Supreme Court Rule 13(1) provides:

> A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

That rule applies here. Petitioner states that it is "[t]he Judgment by the Court of Appeal for which this Court's Review is sought." Pet. 10. The court of appeal's judgment was rendered on June 16, 1997. Pet. App. 1a. Petitioner sought discretionary review of that judgment by the California Supreme Court (the state court of last resort) by a Petition for Review filed July 25, 1997. Pet. 1. The California Supreme Court denied review on September 17, 1997. Pet. App. 19a. That concluded the appellate process for reviewing the court of appeal's judgment and started the 90-day period for filing a petition for certiorari. That period expired on December 16, 1997. Bayer

did not file her Petition until March 18, 1998, some three months too late.[2]

The Petition is untimely. It should be summarily denied.

II. THE PETITION SEEKS TO PRESENT ISSUES NOT RAISED BELOW

Petitioner asks this Court to address whether due process was denied (1) by "[i]nconsistent and directly contrary enforcement of 'state policy' by two arms of the state government," Pet. 13-14, and (2) where the "state court forged a 'Settlement' agreement . . . but then refused a single hearing with a standard of review either *adequate* to actually enforce, or to comply with, its terms." Pet. i. But Petitioner did not raise these or any other federal constitutional complaints anywhere in the line of proceedings below. This is fatal to her Petition.

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[2] Bayer's subsequent "Petition for Writ of Review," filed on November 17, 1997, and denied on December 23, 1997, does not alter this conclusion. That Petition did not extend the regular appellate process, but rather sought extraordinary writ relief based on the claim that the Supreme Court of California exceeded its jurisdiction when it denied review of her case. Pet. 16. Thus, that Petition was a collateral proceeding outside the normal channels of appellate review. It did not alter the finality of the Supreme Court's first and only refusal to review her case on the merits. This is true even were it claimed that the Petition for Writ of Review should be construed as a Petition for Rehearing. California Rule of Court 27 requires such a petition to be filed within 15 days. Bayer's Petition for Writ of Review was filed 61 days after the Supreme Court denied review. Pet. 1.

Petitioner admits the essential facts, but claims that her "first reasonable opportunity to raise the constitutional violation when it occurred or was ripe, and the first opportunity to invoke the protection of the Federal Constitution," was in her Petition for Writ of Review to the California Supreme Court. Pet. 16. This is not true. The substance of the decisions rejecting Bayer's claims has not changed. If her federal rights were violated (they were not), the violation occurred at the arbitration and again at each subsequent step of judicial review. She could have raised her federal claims at any point, but did not. Moreover, as explained above, Petitioner's attempt to obtain extraordinary relief was collateral to the case she asks this Court to review. Asserting her constitutional theories in that proceeding did not preserve them in this one, which had already ended.

Thus, the Petition claims violations of federal law never decided, or even argued, below. Petitioner herself so concedes. She cannot raise those claims for the first time in this Court. *See Illinois v. Gates*, 462 U.S. 213, 217-223 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *see also* 28 U.S.C. § 1257; Sup. Ct. R. 14.1(g)(i). This is another reason why the Petition should be summarily denied.

III. THE PETITION DOES NOT PRESENT ANY QUESTION WORTHY OF REVIEW

Even if Bayer's purported federal claim had been timely raised and properly preserved, it still does not merit review. The Petition does not identify any relevant conflict in decisions or any important question of federal

law requiring resolution by this Court, let alone "compelling reasons" for review. Sup. Ct. R. 10.

This is a garden variety state employment and contract law case resolved on its facts under settled state law. It is clear from the Petition itself that Bayer simply seeks another venue for disputing the findings of fact made over two years ago in binding arbitration. *See, e.g.*, Pet. 5, n.2 (disputing findings as to whether Petitioner was laid off or fired and Petitioner's actions subsequent thereto); Pet. 8 (alleging facts omitted from arbitrator's findings); Pet. 9 ("the arbitrator's findings . . . cannot be accurate without the necessary findings on the issues of illegality . . . [t]he award, (sic) on its face proves that the arbitrator failed to make the key findings . . . [N]o findings were made as to whether Stanford wrongfully demoted, disciplined, threatened and terminated plaintiff"). This Court does not sit to decide questions of fact. *See* Sup. Ct. R. 10.

Bayer also complains about the California state law standard of review of arbitration decisions. Pet. 10-12 (standard of review inadequate to enforce the terms of the settlement and was meaningless); Pet. 14-16 (state courts affirmance of arbitrator's award without independent judicial findings denied Petitioner due process). However, California law is clear: under the arbitration process to which Bayer and her counsel agreed, the arbitrator's findings of fact are not subject to independent judicial review. *Board of Educ. v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269, 275 (1996); *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 11-14 (1992). Bayer's failure to recognize this principle, and to accept the arbitrator's fact findings led the court of appeal twice to note that she

"misses the point." Dec. 6. Yet Bayer's Petition for certiorari is still rehashing those same arguments, still refusing to accept the findings, and so still missing the point.

Thus, the Petition essentially tries to convert issues of fact and dissatisfaction with settled state law rules into a denial of due process, but it offers no reason why this case implicates due process any more than any other routine state law case. In fact, Bayer received more process than is due. She fully litigated her employment dispute in binding arbitration. She then presented her claims to the superior court, the court of appeal and the California Supreme Court, all of which upheld the arbitrator's decision. She even sought an extraordinary writ from the California Supreme Court. No court found Bayer's claims meritorious.

Bayer was not denied any due process. She simply lost, on the facts and under settled law. There is no issue for this Court.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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April 23, 1998